

SERVICE DATE – AUGUST 28, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35819

BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL, LLC—PETITION FOR
DECLARATORY ORDER

Digest:¹ This decision holds in abeyance a request that the Board issue a declaratory order finding that the construction and operation of rail track in Yaphank, Suffolk County, N.Y., are: (1) subject to the Board’s jurisdiction and the resulting preemption of state and local permitting and preclearance requirements; and (2) exempt from the Board’s licensing and environmental regulation because the track is a spur.

Decided: August 26, 2014

On April 28, 2014, Brookhaven Rail Terminal (BRT)² and Brookhaven Rail, LLC, a Class III rail carrier (Brookhaven Rail) (together Petitioners) filed a petition seeking issuance of a declaratory order finding that the 12,500 feet of rail track (the Track) that BRT proposes to construct and operate over in Yaphank, Suffolk County, N.Y., is exempt from the Board’s licensing and economic regulation and is not subject to state and local permitting and preclearance requirements due to Federal preemption.³

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² BRT is the trade name for Brookhaven Terminal Operations, LLC. We refer to “the BRT” when referring to the actual transload facility.

³ In Brookhaven Rail Terminal & Brookhaven Rail, LLC—Petition for Declaratory Order, FD 35141 (STB served Sept. 9, 2010) (herein, FD 35141), the Board granted an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10901 for U S Rail Corporation (U S Rail), a Class III rail carrier, to construct and operate an 18,000-foot rail line on Parcel A, in Brookhaven (now referred to as Yaphank). U S Rail subsequently assigned this construction and operation authority together with a leasehold interest in the underlying property to U S Rail New York, LLC, which was renamed Brookhaven Rail, LLC, by its equity-owner, Oakland Transportation Holdings LLC. See Gabriel D. Hall—Corporate Family Transaction Exemption—U S Rail N.Y., LLC, FD 35458 (STB served Jan. 7, 2011); Nev. 5, Inc.—Control Exemption—GTR Leasing LLC, FD 35635 (STB served June 15, 2012).

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The BRT is a railroad transloading facility with approximately 18,000 linear feet of track on a piece of property known as Parcel A. Brookhaven Rail provides rail and transloading services, principally the switching and marshalling of rail cars in the BRT. Linehaul freight rail service is provided to the BRT over the Long Island Railroad (LIRR) by New York & Atlantic Railway Company, a Class III rail carrier that interchanges with Brookhaven Rail at the switch lead to the BRT.

In their petition, Petitioners explain that the Track BRT proposes to construct and operate over would be built on Parcels B and C, which are adjacent to the transloading facility located on Parcel A. Petitioners argue that the Track falls under the definition of a “spur” track under 49 U.S.C. § 10906, and thus does not require Board construction approval, including the corresponding environmental review that would be required under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f. Petitioners further request that the declaratory order find the proposed construction and operation are subject to the Board’s exclusive jurisdiction over rail transportation pursuant to 49 U.S.C. § 10501(b) and are thus preempted from state and local permitting and preclearance statutes and regulations.

The Town of Brookhaven, N.Y. (the Town), in a reply filed on May 19, 2014, asserts that BRT, Brookhaven Rail, and Sills Road Realty, LLC (Sills),⁴ although purporting to construct an exempt spur, are actually building a 12,500-foot extension to a line of railroad, which would require a license from the Board. The Town states that the Petitioners are also building extensive warehousing, manufacturing, and shipping facilities and a proposed liquefied petroleum gas (propane) transfer station on Parcels B and C. In addition, the Town accuses the Petitioners of engaging in illegal sand mining, deep excavation, and the processing of construction debris. Further, the Town asserts that BRT plans to extend the Track to another 255-acre site (Parcel D), which BRT’s principals now allegedly own. The Town states that once all this work is completed, the BRT facility will constitute “an immense regional and Long Island transportation ‘hub’ with largely unspecified activities, many of which fall well beyond the ambit of railroad activities.” Town Reply at 9.

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In a letter filed on March 13, 2014, the Town of Brookhaven, N.Y., requests that FD 35141 be reopened, contending that BRT and Brookhaven Rail are not complying with the environmental mitigation requirements embraced in a “Stipulation of Settlement” agreed to by the parties and with three other environmental conditions imposed by the Board. By a decision served today in that proceeding, the Board denied the petition to reopen.

⁴ Sills is in the business of using and selling construction materials and aggregate and allegedly owns Parcels A, B, and C that are the subject of the Town’s request to reopen in Docket No. FD 35141 and the petition for declaratory order here.

Even if Board approval is not required for the construction project, the Town contends that any activities being performed by or on behalf of Sills do not qualify for federal preemption from state and local regulation under § 10501(b), because Sills is not a rail carrier or acting on behalf of a rail carrier. The Town states that it has issued both a summons to BRT for non-permit related violations of local law and a stop work order for non-railroad related activities. In addition, the Town states that it has commenced a lawsuit in the New York State Supreme Court, Suffolk County, arguing that BRT, Brookhaven Rail, and Sills have violated state and local ordinances and have breached the Stipulation of Settlement.⁵ The suit, by stipulation of the parties, was removed to the U.S. District Court for the Eastern District of New York (Court).⁶

The Town requests that the Board find that the Track BRT plans to construct is not a spur and is subject to agency review, including environmental review, and that other planned activities related to the expansion are not bona fide railroad activities and are thus not entitled to federal preemption. The Town further requests that the Board direct BRT “to halt its illegal and environmentally devastating and unpermitted activities on the site.” Town Reply at 2.

On June 9, 2014, Petitioners filed a motion asking the Board to close the record and to issue a decision. The Town filed a reply in opposition on June 12, 2014. Petitioners filed a reply to the Town’s reply on June 20, 2014.

On June 24, 2014, the Town filed a supplement in support of the submission to update the record that it filed in FD 35141 on May 16, 2014, and in opposition to Petitioners’ motion to close the record and issue a decision. In the supplement, the Town reports that the Court, on June 23, 2014, issued a preliminary injunction⁷ enjoining and restraining Petitioners “from undertaking any activities to mine, excavate, sell, grade, and/or remove native sand, minerals and vegetation from Parcels B and C, during the pendency of this action and pending further order of the Court.”⁸ Petitioners filed a reply to the Town’s supplement on July 14, 2014. In the reply, Petitioners renew their request to close the record. They also request that we not accept into the record the documents contained in the Town’s supplement and enter a decision on the petition for a declaratory order as soon as possible. In the interest of a more complete record, the Board will accept the Town’s June 24, 2014 submission and Petitioners’ July 14, 2014 reply into the record.

⁵ See supra note 3.

⁶ U.S. District Court, E.D.N.Y., Case No. 14-CV-02286.

⁷ Previously, on May 13, 2014, the Court had issued a temporary restraining order prohibiting any activities to excavate, screen, grade, or remove native sand and vegetation.

⁸ The Town’s supplement included a copy of: (1) the Preliminary Injunction Decision and Order; (2) a cease and desist letter to Petitioners from, and a declaration to the Court by, the Long Island Power Authority (LIPA) with respect to BRT’s alleged encroachment and unauthorized sand mining activities on LIPA property; and (3) a cease and desist letter to Petitioners from LIRR with respect to BRT’s alleged encroachment and unauthorized sand mining activities on LIRR property.

DISCUSSION AND CONCLUSIONS

In their request for a declaratory order, Petitioners stated that their petition was “directly relevant” to the action pending in the Court and “would facilitate resolution of that matter.” The Petitioners and the Town continued to litigate their dispute in federal court while simultaneously seeking resolution of their dispute in this proceeding.

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate a controversy or remove uncertainty. However, issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be decided either by the Board or the courts in the first instance, as both the Board and courts have concurrent jurisdiction to determine preemption. See, e.g., 14500 Ltd.—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8 (STB served May 3, 2005).

Here, the Court is addressing the preemption issues that Petitioners have raised in this docket. See Town of Brookhaven v. Sills Rd. Realty, No. 14-CV-2286, slip op. at 15-17 (E.D.N.Y. June 23, 2014). As noted, the Court has issued both a temporary restraining order and a preliminary injunction against Petitioners, and the Court has not indicated that the matters in the petition before the Board should be addressed by the Board in order to facilitate proceedings before the Court. Nor has the Court referred the dispute before it to the Board under 28 U.S.C. § 1336(b) for the Board’s determination. Under these circumstances, we will hold our consideration of the petition in abeyance pending a ruling by the Court.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Petitioners’ request for issuance of a declaratory order in this proceeding will be held in abeyance pending a final ruling by the U.S. District Court on the issues currently before it.
2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.